No. 80-421

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ERWIN FOXMAN AND EDITH FOXMAN, PETITIONERS

v.

JOHN P. RENISON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners[1] seek review of the dismissal of their suit for damages against respondent, a former Internal Revenue Service agent, for alleged violations of their constitutional rights during the course of an audit of their federal income tax returns.[2]

Petitioner is a dentist in Rochester, New York, whose practice consists largely of Medicaid patients. In November 1970, the Internal Revenue Service undertook

[1]Edith Foxman is the wife of Erwin Foxman. Erwin and Edith Foxman filed joint tax returns during 1968-1971. References to "petitioner" are to Erwin Foxman.

[2]Although petitioners cite (Pet. 2) 28 U.S.C. 2101(c) as the jurisdictional basis of their petition, we believe that the correct jurisdictional provision is 28 U.S.C. 1254.

an audit of petitioners' 1969 federal income tax return. Responsibility for that audit was assigned to respondent (Pet. App. 3562).[3] After the Commissioner determined a deficiency for 1969, respondent was assigned the audit of petitioners' 1968 and 1970 tax returns. In May 1972, respondent concluded the audit for those years, and proposed income tax deficiencies for each year, to which the petitioners consented[4] (Pet. App. 3560).

Respondent then examined petitioners' 1971 tax return in order to conform that year's return to the agreed changes for 1968-1970. In October 1972, respondent proposed a deficiency for 1971. After being advised of these proposed adjustments, petitioners requested a district conference. As a result of the conference, the proposed deficiency was sustained in part, and petitioners consented to the revised deficiency (Pet. App. 3560-3561). Petitioners thereafter filed a claim for refund for each of the years 1968 through 1970, in order to conform their tax returns for 1968-1970 to the 1971 return. These claims were partially allowed (Pet. App. 3561).

Petitioners took no further administrative action to contest the tax liabilities determined. Instead, they brought suit against respondent in the United States District Court for the Western District of New York for damages for alleged violations of their constitutional

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[3] The appendix to the petition was not re-numbered. References to the page numbers are therefore to the original pagination; "R." refers to the record appendix filed in the court of appeals.

[4] In April 1971, while respondent was conducting the audit, the case was referred to the Intelligence Division, for potential criminal prosecution for fraud. It was continued as a joint investigation until January 1, 1972, when the case was returned to the Audit Division (R. 61).

rights. The district court granted respondent's motion for summary judgment and the court of appeals affirmed (Pet. App. 3559-3565).

1. The decision below correctly rejected petitioners' claim that respondent's actions during the course of auditing their tax returns violated their constitutional rights to due process and equal protection of the laws. Petitioners allege that they were given the option of accepting respondent's report of tax deficiencies or possibly being subjected to a second investigation for fraud. But the record indicates that petitioners were advised by their accountant that they could accept the revenue agent's report and forestall a fraud investigation, while at no time giving up their rights to seek further administrative or judicial review of the deficiencies assessed (Pet. App. 94). On the other hand, respondent could have recommended that an investigation by the Intelligence Division proceed (Pet. App. 94). *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), upon which petitioners rely (Pet. 21-25), is therefore inapplicable. Indeed, in that case, the Court held that an arguably far more palpable deprivation of liberty—where a state prosecutor carried out a threat to reindict the defendant on more serious charges if he did not plead guilty to lesser offenses—did not violate the defendant's rights to due process.

2. Petitioners further claim (Pet. 26) that the claim for which they seek recovery "is not the type of damage which was redressable through IRS review procedure," and may be vindicated only by a suit for damages. But even assuming that damages would be an appropriate remedy for the alleged violations, petitioners have not stated a cause of action which asserts a constitutionally-protected right. Petitioners chose not to take advantage of the internal appeal process and judicial remedies available to

them to challenge their asserted tax liability. The courts below therefore correctly refused to allow them to seek damages as a substitute for their inaction.

3. Petitioners also assert (Pet. 31-33) that respondent intentionally violated Internal Revenue Service regulations in conducting successive audits, and in so doing violated their rights to due process. However, the audits for petitioners' returns for 1968-1970 were assigned to respondent by his supervisor, and he was assigned the audit for 1971 only for the purpose of conforming that year's return to the changes agreed to by petitioner for the earlier years. Petitioners made no showing that this procedure violated any agency regulations.

4. Petitioner claims (Pet. 33-38) that respondent intentionally caused the termination of a financing relationship between him and the First National Bank of Rochester. But the deposition testimony indicated that the bank terminated this relationship primarily because it was unprofitable. Indeed, there is nothing in the record to support petitioners' assertion that respondent deliberately interferred with this agreement in any way. At all events, as the court below noted (Pet. App. 3564-3565), petitioners did not have a property interest protected by the Due Process Clause because they did not have a legitimate claim of entitlement to the financing relationship. Cf. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

5. Finally, petitioners contend (Pet. 39-41) that the court of appeals has granted absolute immunity to Internal Revenue Service agents from damage suits where violations of constitutional rights have been alleged. But the district court dismissed the complaint because it failed to state a claim based upon a violation of constitutional

rights.[5] Here, all audits conducted by respondent were reviewed and approved by supervisory personnel in the Buffalo District Office of the Internal Revenue Service. Thus, even if petitioners had established a claim arising from a constitutional violation, the suit would be barred by the defense of qualified immunity, because there were reasonable grounds for respondent's belief that the challenged actions were appropriate, and there was no finding that he acted in bad faith in carrying out his duties. *Butz* v. *Economou*, 438 U.S. 478 (1978); *Tigue* v. *Swain*, 585 F. 2d 909 (8th Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[5]With respect to petitioners' final argument (Pet. 41-46) that the district court should have tried their state law claims under the doctrine of pendent jurisdiction, there is nothing in the complaint which rises to the level of either a federal or state constitutional violation. The district court found the constitutional claims alleged to be insubstantial (Pet. App. 58-72). Therefore, its decision not to exercise pendent jurisdiction was proper. *Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

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